BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0072012076:

CECELIA ORLOWSKI,	)	Case No. 1136-2007
	)	
Charging Party,	)	
	)	
vs.	)	**DECISION**
	)	
WILLIAM STAFFELDT,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. Procedure and Preliminary Matters

Cecelia Orlowski filed a complaint with the Department of Labor and Industry on August 8, 2006. She alleged that William Staffeldt, her landlord, illegally retaliated against her because she filed a complaint of housing discrimination on the basis of religion. On January 17, 2007, the department gave notice Orlowski's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer. The parties agreed to extend department administrative proceedings for more than 12 months after complaint filing.

The contested case hearing convened on October 10, 2007 and concluded on October 11, 2007, in Helena, Montana. Orlowski attended with her counsel, Elizabeth A. O'Halloran, Milodragovich, Dale, Steinbrenner & Nygren, P.C. Staffeldt attended with his counsel, Gregory A. Van Horssen, Keller, Reynolds, Drake, Johnson & Gillespie, P.C. Copies of the exhibit and witness tables from hearing and the docket for the Hearings Bureau's file accompany this decision. The issues to be decided appear in the final prehearing order.

II. Findings of Fact

1. Respondent William Staffeldt (Staffeldt) took over ownership of the apartment complex located at 201 E. 6th Avenue in Helena, Montana, effective January 1, 2006.

2. On January 1, 2006, Apartment 7 of the apartment complex was occupied by Charging Party Cecelia Orlowski (Orlowski) and her grandson, Dallas Orlowski. Orlowski occupied apartment 7 under a Section 8 agreement.

3. Effective January 1, 2006, Orlowski rented an apartment from Staffeldt. Orlowski entered into a month-to-month rental agreement with Staffeldt on or about January 10, 2006.

The agreement required Staffeldt to maintain the property and provide and pay for gas, hot water, water, sewer service and garbage removal.

4. In early February 2006, Staffeldt issued to Orlowski a notice to Correct Violation regarding open windows in her apartment.

5. Orlowski filed a Human Rights Bureau Complaint against Staffeldt on March 21, 2006, alleging unlawful discrimination on the basis of religion. She alleged that Staffeldt prevented her from practicing her religion because she was prevented from opening the windows in her apartment when engaged in smudging, which entailed the burning of herbs.

6. The parties settled that complaint. Orlowski signed the settlement agreement on April 28, 2006. Staffeldt signed it on or about April 29, 2006. The parties agreed upon the terms of the settlement prior to their signatures. The Human Rights Bureau Chief signed the settlement, approving it, on May 2, 2006.

7. As part of the settlement, Staffeldt agreed to pay Orlowski $500.00 and Orlowski agreed to vacate the premises. The settlement decreased the payment due from Staffeldt if Orlowski stayed longer, essentially resulting in a loss of a portion of the payment if she stayed beyond April 30, 2006. Staffeldt retained the right to perform a move-out inspection.

8. Staffeldt ultimately performed the move-out inspection on the evening of April 29, 2006. Staffeldt inspected the apartment with the aid of a "civil standby" peace officer who facilitated Staffeldt's inspection without any breach of the peace.

9. Staffeldt made notes of his observations during the April 29, 2006, inspection and then provided to Orlowski a notice of the cleaning required for return of her security deposit. She and the people assisting her finished their cleaning the apartment after receiving the notice.

10. After Orlowski vacated the premises, Staffeldt again inspected the premises and arranged for additional cleaning, repairs and garbage removal. His ultimate accounting for the cost of this additional work included items he had noted as "good" in his April 29, 2006, inspection, as well as items for which he, as landlord, was responsible in any event.

11. Staffeldt retained Orlowski's entire security deposit of $500.00 and initially assessed an additional $874.00 in damages. He later reduced the additional damages claimed to $665.00. He testified at hearing that he did not intend to pursue the additional damages.

12. The premises were in very poor condition when Orlowski vacated them. However, the substantial and credible evidence established that damage to the carpets and the bathroom, and to other parts of the premises, more likely than not occurred before, and in some instances, substantially before Staffeldt became the landlord just 4 months before the end of the landlord-

tenant relationship. In addition, Orlowski and her guests had smoked steadily in the apartment during her entire tenancy. There was no credible and substantial evidence that the apartment was in worse condition at the end of the tenancy than when Staffeldt assumed the landlord role.

13. It is more likely than not that the apartment was not appreciably better in January 2006 than it was on April 30, 2006, with regard to smoke damage, carpet damage, water damage in the bathroom and all other conditions not attributable to normal wear and tear. Any difference allegedly established by Staffeldt's documents necessarily resulted from a cursory inspection in January 2006, and an intense scrutiny of the apartment after Orlowski moved out of it on April 30, 2006. Staffeldt, when he became Orlowski's landlord, did not provide an accurate clear and concise statement of the present condition of the premises, and he knew or should have known the present condition of premises. He did not establish by clear and convincing evidence that the damages for which he claimed recovery occurred during Orlowski's tenancy with him, let alone that it was caused by Orlowski, her grandson or their invitees.

14. It is more likely than not that Staffeldt exaggerated the difference between the condition of the apartment in January 2006 and the condition of the apartment after Orlowski vacated it on April 30, 2006, because of his hostility toward Orlowski resulting from her Human Rights complaint that he settled for $500.00 and her agreement to vacate the premises.

15. Staffeldt behaved in a hostile fashion toward Orlowski because she filed a religious discrimination complaint against him. Staffeldt's conduct confirmed and corroborated the presumption of retaliatory motive arising out of the proximity in time between the filing and the pendency of the religious discrimination complaint and the adverse acts against Orlowski.

16. There was no proof that Staffeldt acted adversely toward Orlowski because of her religion (as opposed to retaliating because of her complaint of religious discrimination) in any fashion not resolved by the settlement of the complaint of religious discrimination.

17. Staffeldt retained the security deposit to retaliate against Orlowski for her complaint of religious discrimination and to recoup the settlement amount, denying her the benefit of her bargain in settling her claim. He inflated his claim beyond the amount of the security deposit to recover both the security deposit and the settlement amount, or at least to discourage Orlowski from contesting the security deposit retention out of fear of owing more. Staffeldt's exaggerated statements of the amounts necessary for cleaning as well as repair, out of retaliatory hostility toward Orlowski, justify requiring him to pay to Orlowski the entire security deposit and an additional equal amount, to match the recovery to which Orlowski would be entitled under the applicable landlord-tenant law. This adequately rectifies the harm Orlowski suffered from loss of use of the deposit since its wrongful withholding, and obviates the need to add prejudgement interest to her award.

18. Orlowski suffered short but intense emotional distress resulting from Staffeldt's conduct toward her regarding the security deposit and the claim for additional damages. His hostile conduct because of her pursuit of a claim of religious discrimination was the proximate cause of her emotional distress. The value of that emotional distress is $4,500.00.

19. In addition to a mandatory injunction, the department should order Staffeldt to attend training approved by the Human Rights Bureau regarding diversity and tolerance and the scope of the prohibition against retaliation under federal and state discrimination laws and to adopt a policy against retaliation. Both the training and its duration, as well as the appropriate content of the policy, should be reviewed and approved by the Human Rights Bureau.

III. Opinion

Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact, in accordance with *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

A. The settlement agreement does not bar the retaliation claims based on Staffeldt's conduct after the settlement was reached.

Before addressing the merits of the case there is a preliminary issue–whether the settlement agreement bars this claim, because it somehow either settled all retaliation as well as religious discrimination claims[1] or preempted any new discrimination claims (including retaliation) in favor of landlord-tenant law.[2]

The settlement agreement is a contract between Staffeldt and Orlowski–subject to the usual construction of contracts should the parties disagree about its meaning. *Gamble v. Sears*, ¶24, 2007 MT 131; 337 Mont. 354; 160 P.3d 537. Staffeldt's arguments regarding the meaning of the two provisions of the contract that he interposes as affirmative defenses are unconvincing in light of the plain language of the agreement. Mont. Code Ann. § 28-3-302.

Orlowski agreed not to initiate any new discrimination complaint "based upon the facts underlying" her religious discrimination complaint. The settlement did preclude earlier hostile and arguably adverse actions by Staffeldt from being the basis for liability and damages in this case. The Hearing Officer granted a directed verdict on religious discrimination claims based on actions from April 14, 2006 to the present, because the evidence reflected no smudging by Orlowski on or after that date, due to fear of Staffeldt's reaction based upon his previous conduct. The settlement precluded any claims based upon his previous conduct.

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[1] Exhibit 37, the agreement, provides, in pertinent part that Orlowski " agrees to discontinue [her religious discrimination case] and agrees not to initiate any new discrimination complaint based upon the facts underlying the present complaint."

[2] Exhibit 37 further provides that Staffeldt "will comply with landlord/tenant laws regarding [Orlowski's] security deposit."

The settlement could not settle claims that arose after it was reached, based upon conduct after it was reached. Thus, Orlowski could not possibly have released claims that Staffeldt retaliated against her after the settlement was reached, in dealing with (1) her departure from the apartment complex, (2) her security deposit and (3) alleged damages and cleaning costs beyond the security deposit. Thus, the only claims adjudicated in this decision to which the settlement applies are the religious discrimination claims and any other claims arising out of conduct occurring before the settlement was reached. Those prior event claims are precluded and, together with unproved religious discrimination claims for conduct after the settlement was reached, were dismissed during hearing. They are included only in the order portion of this decision.

Staffeldt agreed to comply with landlord/tenant laws regarding Orlowski's security deposit. Orlowski did not agree that landlord/tenant law would preempt claims for discrimination or retaliation that arose after the settlement was reached. Such preemption would amount to a waiver of future Human Rights Act claims for the pendency of the landlord tenant relationship between Staffeldt and Orlowski. If the contract meant this, Staffeldt contracted for release of any future illegal conduct. That is not the plain meaning of the contractual provision. If it were the intent of the contract, which it clearly was not, such a contract would be void, for having an illegal object and for being against public policy, Mont. Code Ann. §§ 28-2-701 and 702, at least as to any such waiver of future claims. Mont. Code Ann. § 28-2-604.

B. Staffeldt retaliated against Orlowski for her religious discrimination complaint by wrongfully retaining her security deposit and by asserting an additional inflated claim against her.

Montana law prohibits retaliation against an individual who has filed a discrimination complaint under the Human Rights Act or otherwise participated in a Human Rights Act proceeding. Mont. Code Ann. § 49-2-301; *Mahan v. CENEX* (1989), 235 Mont. 410, 768 P.2d 850, 857-58. This prohibition also appears in the Human Rights Commission's regulations, at Admin. R. Mont. 24.9.603(1):[3]

> It is unlawful to retaliate against or otherwise discriminate against a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation.

Retaliation necessarily includes acting "to coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of . . . a [housing] right granted or protected by this section." Mont. Code Ann. § 49-2-305(9). This statutory provision supports the rule that

[3] Sub-chapter 6 of the Commission's rules apply to this contested case before the department. 24.9.107(1)(b) A.R.M.

defines unlawful and retaliatory actions to include "coercion, intimidation, harassment . . . or other interference with the person or property of an individual." Admin. R. Mont. 24.9.603(2)(a).

A ***prima facie*** indirect evidence case of unlawful retaliation in violation of Mont. Code Ann. § 49-2-301 has three elements. First, the claimant must prove that she engaged in activities protected by the Human Rights Act. Filing a Human Rights claim is protected activity. Second, she must prove that the respondent subjected her to a significant adverse action. Third, she must establish a causal connection between the adverse action and her protected activities. If the respondent took the action with knowledge that the claimant's claim was pending or within six months after its closure, the retaliatory motive is presumed. Admin. R. Mont. 24.9.603(3).

The rule's presumption of retaliatory motive can establish a causal connection between protected activity and adverse action. *Laib v. Long Constr. Co.* (Aug. 1984), HRC ReAE80-1252, ***citing*** *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793; ***accord***, *Schmasow v. Headstart*, HRC 8801003948 (Jun. 1992); ***see***, *Moyo v. Gomez* (9th Cir. 1994), 40 F.3d 982, 984; *Alexander v. Gerhardt Ent., Inc.* (7th Cir. 1994), 40 F.3d 187, 195. The claimant must establish that the respondent would not have taken the adverse actions except for her protected activity. *EEOC v. Hacienda Hotel* (9th Cir. 1989), 881 F.2d 1504, 1513-1514; ***see***, *Ruggles v. Cal. Poly. State Univ.* (9th Cir. 1986), 797 F.2d 782, 785, and the presumption can provide this proof.

Proof of proximity in time between the protected activity and the adverse action constitutes evidence of retaliatory motive, even without the Human Rights Commission's regulation. ***See,*** *Love v. Re/Max of America* (10th Cir. 1984), 738 F.2d 383. Proof that respondent knew of the Human Rights Act complaint before the adverse action is part of that evidence. *Wall v. A.T.&T. Tech., Inc.* (D.C. N.C. 1990), 754 F.Supp. 1084.

These cases follow the basic *McDonnell Douglas* method[4] of evaluating discrimination claims, adopted in Montana. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209; *Martinez v. Yellowstone Co. Welf. Dept.* (1981), 192 Mont. 42, 626 P.2d 242.

Montana can follow federal discrimination case law when the same rationale applies under the Montana Human Rights Act. *Crockett,* 761 P.2d ***at*** 818; *Johnson,* 734 P.2d ***at*** 213. Resorting to federal case law is proper but is not mandatory. *Longan v. Milwaukee Station Restaurant*, HRC No. AE82-1796 (Nov. 83). It is proper here to apply the federal precedent. The consistency between the federal cases and the Montana cases confirms that it is proper to

[4] *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792

rely upon the presumption to verify that the clear hostility between Staffeldt and Orlowski did result from the prior religious discrimination complaint.

To establish her prima facie case of unlawful retaliation in violation of Mont. Code Ann. § 49-2-301, Orlowski had to prove three elements: (1) that she engaged in activities protected by the Human Rights Act (which she established by proving her prior religious discrimination complaint; (2) that Staffeldt subjected her to significant adverse acts (the withholding of her security deposit and the claim for additional money constituted such acts) and (3) that there was a causal connection between the significant adverse acts and her protected activities (established by the presumption supplied under Admin. R. Mont. 24.9.603(3)).

In addition to the presumption, the evidence of the tension and hostility between these parties as Orlowski's tenancy came to an end is direct evidence of Staffeldt's animosity toward Orlowski because of her religious discrimination complaint. There are also Staffeldt's exaggerations of what he did that would be chargeable to Orlowski (such as hauling the garbage) after she vacated. Thus, Orlowski satisfied the elements of a prima facie case of retaliation, and in addition presented direct evidence of Staffeldt's retaliatory hostility.[5]

With the establishment of Orlowski's ***prima facie*** case, Staffeldt had the burden, with regard to the indirect evidence, to discredit that case and/or to show a legitimate business purpose for his adverse acts. This is the second tier of the three tier *McDonnell Douglas* indirect evidence test.

Staffeldt must satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 255-56. Staffeldt need only raise a genuine issue of fact by clearly and specifically articulating legitimate reasons to keep the deposit and claim more damages. *Johnson*, ***op. cit.***, 734 P.2d ***at*** 212. Staffeldt met his burden to show legitimate reasons with evidence of how much cleaning remained after Orlowski vacated the premises, evidence that he had given Orlowski notice of at least some of the cleaning, and evidence of the damages to the premises that he repaired.

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[5] Evidence of Staffeldt's hostility toward Orlowski before the settlement agreement was reached is admissible with regard to this causation element, even though none of Staffeldt's conduct prior to the settlement agreement can serve as a basis for recovery. Mont. R. Ev., Rule 404(b) provides that evidence of other acts, not admissible to prove Staffeldt's character in order to show that the alleged retaliation is in conformity with that character, can be admissible to prove motive.

Once Staffeldt produced legitimate reasons, Orlowski had the burden of proof that his reasons were pretextual. *McDonnell Douglas* ***at*** 802; *Martinez*, ***op. cit.***, 626 P.2d ***at*** 246. To meet this third tier burden, Orlowski could present either direct or indirect proof of the pretextual nature of Staffeldt's proffered reasons:

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine ***at*** 256. Ultimately, Orlowski always had the burden to persuade the fact-finder that Staffeldt did illegally retaliate against her. *Crockett*, ***op. cit.***, 761 P.2d ***at*** 818; *Johnson*, ***op. cit.***, 734 P.2d ***at*** 213.

The evidence is clear and convincing that there was pretext in Staffeldt's claims. The Hearing Officer is satisfied that Staffeldt did illegally retaliate against Orlowski.

Montana law follows federal precedent that Staffeldt can also show that he would have taken the same adverse action irrespective of any unlawful retaliation. *Crockett*, ***op. cit.***, 761 P.2d ***at*** 819; *Muntin v. State of Cal. P.&R.D.* (9th Cir. 1984), 738 F.2d 1054, 1056. This affirmative defense bears the rubric of a "mixed motive" case. In essence, Orlowski proved retaliation, but if Staffeldt would have withheld the entire security deposit and made the additional damages claim even without the retaliatory motive, because he had sufficient nonretaliatory reasons to do so, then no harm to Orlowski resulted from the retaliation--the same result would have occurred without it--and there is nothing to rectify. *Laudert v. Richland Cnty Sheriff's Dept.*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. This is not matter left to the discretion of the Hearing Officer–the department has exercised its discretion by adopting a regulation that requires this outcome whenever the evidence establishes a mixed motive case. Admin. R. Mont. 24.9.611:

> When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation, but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. In a mixed motive case . . . the commission will not issue an order awarding compensation . . . .

Staffeldt did not offer credible and substantial evidence that even without his retaliatory hostility toward Orlowski because of her religious discrimination claim, he would have exaggerated the cleaning costs and damages and would have inflated his claim against her and her security deposit. Mixed motive defenses failed for the same reasons legitimate business

reason defenses failed.[6] Staffeldt's overstatement of his claims cast doubt upon both the claims and the legitimacy of his motives in making the claims.

C. Reasonably to rectify the harm suffered by Orlowski requires an award of $1,000.00 for treble the retained security deposit, an order barring the additional claims against her by Staffeldt, and an award of $4,500.00 for her emotional distress.

The damages the department may award include any reasonable measure to rectify any harm Orlowski suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975).

Although the evidence might otherwise support withholding of at least part of the deposit for additional cleaning, Staffeldt's exaggerated claims, inclusion of improper claims, claims for damages for items (such as carpets and bathroom) that predated his purchase of the premises and were there to be seen when he bought the property, together with his hostile and aggressive efforts to hasten Orlowski's departure while insisting that she do more to clean and repair the premises than was possible, all militate against finding that Staffeldt had a legitimate business purpose in keeping the entire deposit and asserting that Orlowski owed him an additional sum larger than the retained security deposit. Orlowski should be awarded her security deposit, in its entirety.

Prejudgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, ***op. cit.***, 779 P.2d at 523; *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987). The Hearing Officer is aware of no decisions addressing whether interest is available on other similarly quantifiable losses, such as Orlowski's security deposit. But there is no need to inquire into the reasonableness of awarding prejudgment interest on the security deposit, when a more reasonable alternative remedy is clear.

Landlord-tenant law (which Staffeldt agreed to follow) provides that wrongful withholding of a security deposit exposes a landlord to recovery of an additional amount equal to the amount wrongly withheld. Mont. Code Ann. § 70-25-204(1). A landlord who fails to provide a "clear and concise statement of the present condition of the premises known to the landlord or the landlord's agent or which should have been known upon reasonable inspection" in connection with the creation of the tenancy is "barred from recovering any sum for damage

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[6] The Montana Supreme Court has strongly indicated that mixed motive defenses are only available in direct evidence cases and where the parties do not agree on the reason for the adverse action. *Beaver v. Mont. D.N.R.C.*, ¶ 63,2003 MT 287, 318 Mont. 35, 78 P.3d 857. Since Staffeldt's mixed motive defense failed, the Hearing Officer need not decide whether our Court would agree with the solid reasoning of the United States Supreme Court in holding that mixed motive defenses are not strictly limited to direct evidence cases, *Desert Palace, Inc. v. Costa* (2003), 539 U.S. 90, and if not, whether the more limited Montana application of the mixed motive defense should apply here.

to or cleaning of the leasehold premises" except upon proof by clear and convincing evidence that the damage occurred during the tenancy in question and was caused by the tenant or the tenant's family, licensees or invitees. Mont. Code Ann. § 70-25-206(2) and (3). Staffeldt fell far short of meeting this burden of proof.

Therefore, a reasonable measure to rectify the financial harm Orlowski suffered from the retaliatory withholding of her security deposit is to provide her with the remedy to which she would have been entitled under landlord-tenant law for the wrongful withholding of the security deposit and the demand for additional damages. Landlord tenant law would mandate awarding Orlowski the withheld security deposit and an additional equal amount for the wrongful withholding. That is clearly a reasonable measure to rectify the financial harm she suffered because of Staffeldt's retaliatory conduct.

In addition, Orlowski suffered emotional distress as a direct and substantial result of Staffeldt's retaliatory withholding of the security deposit, unremitting hostility and insistence upon unreasonable and improper measures to clean and to repair the premises. The emotional distress was brief in duration, but it was substantial.

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a *per se* invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Vainio*, p. 16, ftnt. 12; *Campbell v. Choteau Bar and Steak House* (3/9/93), HRC#8901003828.

The standard for emotional distress awards under the Human Rights Act derives from the federal case law. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn.Transp. Auth.* (3d Cir.1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden,* in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman,* 107 F.3d at 385.

In this case, as in *Johnson v. Hale* and *Foss*, the evidence regarding the illegal acts (here, acts of retaliation) and Orlowski's evidence of her emotional distress, establish a basis for an award of damages for that emotional distress. The evidence of emotional distress here is stronger than in those cases, based upon the degree of distress displayed by the demeanor of Orlowski during her testimony. $4,500.00 is an appropriate recovery, rather than the $2,500.00 awarded in *Foss* or even the $3,500.00 awarded in *Johnson*[7] for lesser degrees of emotional distress.

IV. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1) (2007).

2. Orlowski settled all claims of illegal discrimination and/or retaliation arising out of the conduct of Staffeldt prior to the effective date of the settlement of her religious discrimination complaint, and all such claims should be dismissed. Orlowski did not prove any religious discrimination occurred after the effective date of the settlement of her religious discrimination complaint, and all such claims should be dismissed.

3. After the effective date of settlement of Orlowski's religious discrimination complaint, Staffeldt retaliated against Orlowski because she had filed her religious discrimination complaint, by withholding her security deposit and illegally claiming she was responsible for additional damages to the premises, and by behaving toward her in a hostile manner in alleging that she had an obligation to do more to clean and repair the premises at the same time that he insisted that she vacate the premises immediately, all in violation of Mont. Code Ann. § 49-2-301.

4. The harm Orlowski suffered as a result of the unlawful retaliation, for which she is entitled to recover from Staffeldt, consists of the security deposit of $500.00, and an equal additional amount the "double damages" recoverable under landlord tenant law for unlawful withholding of a security deposit, for a total of $1,000.00, and her emotional distress, for the amount of $4,500.00, all reasonable to rectify the harm, pecuniary and otherwise, she suffered. Mont. Code Ann. § 49-2-506(1)(b).

5. The department must order Staffeldt to refrain from retaliating against tenants who file discrimination claims against him in the future and should prescribe conditions on his future conduct relevant to his discriminatory practice of retaliation, which Staffeldt must meet to

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[7] In *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351, the district court award of $125.00 per plaintiff was set aside and the district court directed to award at least $3,500.00 per plaintiff for emotional distress resulting from a single encounter for a few minutes with a landlady who refused to rent her premises because of race, even though the plaintiffs were able to find other housing, because of the emotional distress inferred from the basis of the refusal to rent. The evidence of emotional distress is much stronger and more direct in the present case.

continue to operate as a landlord in the state of Montana. Mont. Code Ann. § 49-2-506(1) and (1)(a) through (1)(c).

V. Order

1. Judgment is in favor of the charging party **Cecelia Orlowski** and against the respondent **William Staffeldt** on the charges that the respondent retaliated against the charging party because she filed a religious discrimination complaint against him.

2. The department orders respondent **William Staffeldt** to make immediate payment to charging party **Cecelia Orlowski** of the sum of $5,500.00, as particularized in Conclusion of Law No. 4. Interest accrues on this judgment as a matter of law.

3. The department permanently enjoins respondent **William Staffeldt** from illegally taking adverse actions against tenants or former tenants who file discrimination complaints against him.

4. The department orders respondent **William Staffeldt**, within 60 days after this decision becomes final, complying throughout with the directions of the Human Rights Bureau regarding how to implement these requirements:

> (A) to submit to the Human Rights Bureau a proposed policy, in form of a notice to be posted in each rental building that he owns or operates, that expressly states that he, personally or through any entity operating the premises, will not retaliate against any tenant or former tenant who files a housing discrimination complaint based upon his conduct or that of the entity operating premises; to adopt the policy and post the notices, with changes mandated by the Bureau, immediately upon Bureau approval of them, and
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> (B) to undertake and successfully to complete, at his own expense, training regarding diversity and tolerance and the scope of the prohibition against retaliation under federal and state discrimination laws, as a condition to his continuing to operate as a landlord in the state of Montana, with the prior approval of the Human Rights Bureau for the particular training, and to document to the Bureau the successful completion of the training.

Dated: March 10, 2008

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry